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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 523

SOUTHGATE BROKERAGE COMPANY, INC.,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.

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STATUTES

Clayton Act, as amended by the Robinson-Patman Act:	
Sec. 2(c), 49 Stat. 1527; 15 U. S. C. A., Sec. 13(c),	3, 10, 20
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PETITION FOR WRIT OF CERTIORARI

*To the Honorable, the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Southgate Brokerage Company, Inc., by its attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit, entered in the above proceeding on July 19, 1945 (R. 107), which affirmed an order of the Federal Trade Commission made on September 12, 1944 (R. 40).

Statement of the Matter Involved

Such facts as are found by the Commission are not in dispute. Petitioner is a merchandising broker of food commodities, occupying an intermediary position between food processors, or packers, and the wholesale trade, or jobbers, to whom it sells exclusively (R. 52, 88). Its principal office and place of business is located in Norfolk, Virginia, and it has branch offices and warehouses in Winston-Salem, Charlotte, Wilmington, and Greensboro, North Carolina (R. 42).

Petitioner's brokerage business is conducted in three ways, this proceeding being concerned only with those in the third category (R. 42-3, 88-9). *First*, sales to wholesalers, wherein petitioner merely negotiates the sale and the products are shipped and billed directly by the packers to the wholesale buyers; *secondly*, sales made from stocks consigned by the packers to petitioner, on which petitioner does the billing and assumes credit responsibility, remitting to principals monthly; and, *thirdly*, sales made from stocks kept in its warehouse, to which at the request of the producers or packers petitioner takes title under contracts with the packer limiting the sale thereof to wholesalers only, and within a specified trade territory (R. 31, 52, 93, 95).

About 60% of petitioner's business is made up of this latter type of business (R. 43), which, the offered evidence shows (R. 90, 93, 95-6), has for many years been recognized by the packers, and by the trade, as a definite and necessary function of the merchandising brokerage business, particularly in the southern part of the United States, because of the large number of wholesale grocers in those States, whose unit purchases are small, and who are unable to buy in carload lots, so that it would be necessary to have from 25 to 50 consignees in order to have enough customers to take one carload.

Packers who cannot undertake to arrange direct shipments to these small wholesalers, particularly those on the West Coast, require petitioner to take title, and resell for distribution (R. 91). If these services were discontinued by the merchandising brokers in this area, the offered evidence shows (R. 88, 91-2), the result would be to deny small wholesale grocers access to certain food products, in that if they were to attempt to obtain shipments, as they would be forced to do, in less than carload lots, the freight differentials would be so high as to put them at a substantial competitive disadvantage, and the large wholesaler, who is able to buy in carload lots would acquire a monopoly of that business.

In connection with its services as distributor in this third class of business, the offered evidence shows (R. 88) that petitioner receives, warehouses, handles, advertises, promotes the sale of, sells, invoices and collects for the products to which it takes title, and it is the compensation or allowance which petitioner receives for these services, which is broadly denominated "brokerage," that the Commission's order actually proscribes. The offered evidence also shows (R. 89, 92) that said compensation is available on proportionally equal terms to all other brokers with whom, *and only with whom*, petitioner competes (R. 62, 78).

This action arises from cross-appeals to the United States Circuit Court of Appeals for the Fourth Circuit from an order issued by the Federal Trade Commission under subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Anti-Discrimination Act, approved June 19, 1936 (15 U. S. C. A., sec. 13).

The order directs petitioner to cease and desist from:

"Receiving or accepting from any seller, directly or indirectly, anything of value as brokerage, or any commission, compensation, allowance, or discount in lieu

thereof, upon purchases made for respondent's own account." (R. 46)

Petitioner appealed to the United States Circuit Court of Appeals for the Fourth Circuit from enforcement of said order (R. 66-80), at the same time applying to the court for leave to adduce additional evidence (R. 84-97). The Commission (respondent herein) filed a cross-appeal praying for a decree affirming the order and commanding compliance therewith (R. 82).

The Circuit Court of Appeals entered judgment denying both petitioner's appeal and its application for leave to adduce additional evidence, and granted the Commission's cross-appeal, commanding petitioner to comply with the order (R. 107). Enforcement of the judgment has been stayed pending the final action of this Court (R. 109).

Petitioner challenges the Commission's order in the following respects: (1) The failure of the Commission to make any finding as to whether or not services were or were not rendered for the compensation received by it renders the order void as lacking in an essential and basic finding necessary for its support; (2) The refusal of the Commission and the court below to permit petitioner to introduce evidence, which it offered, as to the services it rendered sellers, for which it received the compensation in question, and the fact that such compensation was available proportionally to its competitors, denied petitioner the full hearing to which it is entitled under the law; (3) It is contrary to the plain language of subsection 2(c) which provides expressly that payments made by a seller "for services rendered" are excepted from the prohibition of the section; (4) Even if the compensation petitioner received for its services was prohibited by subsection 2(c), then it is compensable under subsection 2(d), which permits such compensation to a cus-

tioner when same is available on proportionally equal terms to all competitors of that customer.

Jurisdiction

The jurisdiction of this Honorable Court to review the judgment herein upon certiorari is provided by section 11 of the Clayton Act (38 Stat. 734; 15 U. S. C. A., sec. 21), and section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A., sec. 347(a)).

Questions Presented

1. Whether an order of the Federal Trade Commission, based upon subsection 2(c) of the Robinson-Patman Act, can be sustained without *any* finding by the Commission as to whether services were or were not rendered by the party who receives the compensation?

2. Whether the refusal of the Commission and the court below to permit petitioner to introduce evidence to show the true nature of the services rendered by petitioner, and of the compensation received therefor, and that such compensation was available on proportionally equal terms to all other customers of the seller who competed with petitioner, denied to petitioner the full hearing to which it was entitled by law?

3. Whether a seller is prohibited by subsection 2(c) of the Robinson-Patman Act from paying compensation to the other party for services rendered, or to be rendered, when the other party, in connection with regularly established brokerage practices, takes title to the property of the seller in furtherance of the distribution as directed by the seller?

4. Whether compensation for services rendered by a customer to a seller (authorized under subsection 2(d) of the Robinson-Patman Act if available on proportionally equal terms to all competitors of said customer) is rendered unlawful by the prohibitions of subsection 2(c) of said Act because the customer in the course of the distributing process takes title to the goods in question?

Reasons Relied on for the Allowance of the Writ

1. The decision below establishes a far-reaching and dangerous departure from precedent, in that it upholds an order of an administrative tribunal wholly lacking in findings as to essential and basic facts necessary to bring petitioner within the scope of the statutory authority involved therein, and as such it is contrary to an unbroken line of decisions of this Court.

Morgan v. United States, 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906;

United States v. B. & O. R. R. Co., 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268;

Florida v. United States, 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119;

Mahler v. Eby, 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283;

F. T. C. v. Curtis Publishing Co., 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210;

Wichita R. & Light Co. v. P. U. Comm., 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51;

Steam Tug E. A. Packer v. New Jersey Lighterage Co., 140 U. S. 360, 35 L. Ed. 453, 11 S. Ct. 794;

Graham v. Bayne, 18 How. 60, 15 L. Ed. 265.

2. The refusal of the Commission and the court below to permit petitioner to introduce evidence showing the true nature of the brokerage services rendered to the sellers and of the compensation received therefor, as well as the fact

that there was no discriminatory conduct involved, denied petitioner the full and fair hearing to which it is entitled under an unbroken line of decisions of this Court.

Opp Cotton Mills, Inc. v. Administrator, 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524;

Morgan v. United States, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773;

Ohio Bell Tel. Co. v. Pub. Util. Com. of Ohio, 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724;

Morgan v. United States, *supra*;

Atchison, Topeka & Santa Fe R. Co. v. United States, 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146;

B. & O. R. R. Co. v. United States, 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317;

I. C. C. v. Louisville & Nashville R. R., 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

3. The decision below presents "a clear cut mistake of law of real importance" (*Bingham v. Commissioner*, June 4, 1945, Adv. Op., Vol. 89, No. 16, p. 1191). It is the first or test case in which a merchandising broker, following well recognized and established brokerage methods has been charged with violation of the Robinson-Patman Act for receiving non-discriminatory compensation in connection with the legitimate services it renders, solely because of the fact that in connection therewith it takes title to some of the goods it distributes. The decision in question will penetrate deeply into accepted trade practices, affecting not only merchandising brokers in the conduct of their business, but small producers, packers and processors, wholesalers and jobbers, who will be prejudiced if this method of distribution is denied to them.

4. The court's decision below completely invalidates the express exception provided to the prohibitions set forth in subsection 2(e), permitting payment by sellers for serv-

ices rendered, when the services are performed by the other party to the transaction, and thereby renders nugatory the provisions of subsection 2(d) which permits payment of compensation by sellers to customers where the same is available on proportionally equal terms to all other competing customers.

5. Many similar cases, involving both processors, or packers, and distributors, are being held by the Federal Trade Commission awaiting the decision of this Court in the case at bar. This Court has never passed upon what constitutes "services rendered" within the meaning of this important statute, and the question should be authoritatively settled to finally determine the issue.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 5331, Southgate Brokerage Company, Inc., Petitioner, versus Federal Trade Commission, Respondent, and that the said judgment of the said United States Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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INC.,

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